

**Ghanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan
Awam Malaysia and Anor**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01-98
OF 2007
GOPAL SRI RAM, MOHD GHAZALI AND TENGKU BAHARUDIN
SHAH JJCA
19 JANUARY 2009

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*Labour Law — Employment — Dismissal — Termination of services on two
charges — Appellant admitted to charges — Application to nullify dismissal was
dismissed — Appeal against — Whether appellant was prevented from exercising
right to mitigation before dismissal — Whether there was unexplained delay in
commencement of disciplinary proceedings — Whether there was condonation of
alleged offences committed by appellant — Public Officers (Conduct and
Discipline)(Chapter D) General Orders 1980, general order 26*

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As from 1976 the appellant had held the post of a security guard in the
Administration and Finance Division of the Prime Minister's Department. In
May 1991, two charges were made against the appellant; they were, namely
that he was on 9 May 1991 absent, without permission, from his place of
duty between 7.10am and 7.30am, and that on 15 May 1991 he had
punched a senior security officer. On 26 June 1992 a letter to show cause,
pursuant to general order 26 of the Public Officers (Conduct and
Discipline)(Chapter D) general orders 1980 ('the General Orders'), was
served on the appellant. In response, the appellant admitted committing the
disciplinary offences, prayed for forgiveness and undertook not to repeat the
offences. On 21 August 1992, the Disciplinary Board found him guilty of the
two charges and dismissed him from service. His appeal to the Disciplinary
Appeal Board was also dismissed. The appellant then brought a suit in the
High Court against the Public Service Commission ('the first respondent')
and the Government of Malaysia ('the second respondent') seeking, inter alia,
a declaration that his dismissal was unlawful, void and of no effect. The
appellant contended that the first respondent had breached the rules of
natural justice by not giving any reasons for the appellant's dismissal and that
the dismissal was nullified by the long and unexplained delay by the first
respondent in initiating disciplinary proceedings against him. In the High
Court the appellant made an oral application to amend the statement of
claim by including another ground for nullifying the dismissal, namely that
he was not given an opportunity to make a plea in mitigation before he was
dismissed. The respondents in their defence contended that the dismissal was

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A made in accordance with the General Orders and that there was no basis for the appellant to bring this suit. The High Court dismissed the appellant's action and hence this appeal. In his appeal the appellant submitted that the High Court judge had misdirected himself by concluding that the appellant's application to include the ground that he was not granted the right to mitigation before dismissal was an exercise in futility; that the High Court judge had failed to consider the one year delay in the respondents' commencement of disciplinary proceedings against the appellant; and that the respondent's condonation of the alleged offences by the appellant precluded it from instituting disciplinary proceedings against him.

Held, dismissing the appeal with costs:

- D (1) The High Court judge had not misdirected himself when he concluded that the right to mitigation before dismissal was an exercise in futility and therefore dismissed the appellant's application to orally amend the statement of claim. General order 26(4) of the General Orders clearly provides that there is only one hearing for a show cause letter and that if the officer furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority then the authority shall then proceed to consider and decide on, inter alia, the dismissal of the officer. In the present case, the appellant admitted to having committed the offences he was charged with and then prayed for leniency. Under these circumstances the disciplinary proceedings were in compliance with the General Orders and no injustice or improprieties had been occasioned to the appellant in the disciplinary proceedings (see paras 13, 14, 19 & 20); *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi all Perumal* [2001] 2 MLJ 417 followed.
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- G (2) The delay that the appellant alluded to in this appeal was only for about one year. As the appellant had admitted committing the offences he was charged with and there was no allegation of bad faith on the part of the respondents, the High Court judge had not erred in his findings that the delay did not nullify the dismissal (see paras 15 & 16).
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- I (3) The second offence of voluntarily causing hurt to a senior officer that the appellant admitted to committing was a serious offence. There was no evidence that can be interpreted as amounting to condonation of this offence. The fact that the appellant was transferred to another workplace after the punching incident was not evidence of such condonation. The decision of the disciplinary authority was given after careful consideration of the show cause letter and the appellant's

representation thereto and the delay in commencing disciplinary action against the appellant could not amount to a condonation of the alleged offences (see paras 17 & 18).

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[Bahasa Malaysia summary]

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Dari tahun 1976, perayu telah bekerja sebagai pengawal keselamatan di Bahagian Pentadbiran dan Kewangan di Jabatan Perdana Menteri. Pada Mei 1991, dua pertuduhan dikenakan terhadap perayu, iaitu, bahawa dia, pada 9 Mei 1991, tidak hadir tanpa kebenaran dari tempat bertugasnya antara jam 7.10 hingga 7.30 pagi, dan pada 15 Mei 1991, dia telah menumbuk seorang pegawai kanan keselamatan. Pada 26 Jun 1992, sepucuk surat tunjuk sebab, berikutan peraturan am 26 Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 (Perintah Am tersebut), diserahkan kepada perayu. Sebagai jawapan, perayu mengakui melakukan kesalahan disiplin tersebut, memohon kemaafan dan mengaku janji tidak akan mengulangi kelakuan sebegini. Pada 21 Ogos 1992, Lembaga Disiplin mendapati dia bersalah atas kedua-dua pertuduhan dan memecatnya. Rayuannya ke Lembaga Rayuan Disiplin juga ditolak. Perayu kemudiannya membawa tindakan ke Mahkamah Tinggi terhadap Suruhanjaya Perkhidmatan Awam (responden pertama) dan Kerajaan Malaysia (responden kedua) memohon, antara lain, suatu perisytiharan bahawa pemecatannya adalah menyalahi undang-undang, tidak sah dan tidak membawa kesan. Perayu berhujah bahawa responden pertama menyalahi aturan keadilan semulajadi apabila tidak memberi sebarang alasan untuk pemecatan perayu dan pemecatan tersebut terbatal dengan kelewatan yang terlampau dan tidak bersebab di pihak responden pertama dalam menjalankan tindakan disiplin terhadap perayu. Di Mahkamah Tinggi, perayu membuat permohonan lisan untuk meminda pernyataan tuntutan dengan menambah satu lagi alasan pembatalan pemecatan tersebut, iaitu, dia tidak diberi kesempatan untuk membuat rayuan meringankan hukuman sebelum dia dipecat. Responden-responden dalam pembelaan mereka berhujah bahawa pemecatan tersebut dilakukan bertepatan dengan Perintah Am tersebut dan tiada alasan mengapa perayu perlu membawa tindakan ini. Mahkamah Tinggi menolak tindakan perayu dan maka rayuan ini. Dalam rayuannya, perayu menghujah bahawa hakim Mahkamah Tinggi telah tersalah arah dirinya dengan memutuskan bahawa permohonan perayu untuk memasukkan alasan bahawa dia tidak diberikan hak untuk pengurangan (mitigation) sebelum dipecat adalah tindakan yang sia-sia; bahawa hakim Mahkamah Tinggi gagal mempertimbangkan kelewatan selama satu tahun oleh responden dalam memulakan prosiding disiplin terhadap perayu; dan bahawa apabila responden membiarkan sahaja kesalahan yang didakwa dilakukan oleh perayu, ia menghalang responden daripada memulakan prosiding disiplin terhadapnya.

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- A** **Diputuskan**, menolak rayuan dengan kos:
- (1) Hakim Mahkamah Tinggi tidak tersalah arah apabila memutuskan bahawa hak untuk meringankan hukuman sebelum dipecat adalah sia-sia dan oleh itu menolak permohonan perayu untuk meminda secara lisan pernyataan tuntutan. Perintah am 26(4) Peraturan-Peraturan Am jelas memperuntukkan bahawa hanya ada satu pendengaran sahaja untuk surat tunjuk sebab dan jika pegawai tersebut memberikan representasi yang gagal membuktikan dirinya tidak bersalah yang memuaskan hati pihak-pihak berkuasa badan disiplin yang sewajarnya, maka pihak berkuasa tersebut harus meneruskan untuk mempertimbangkan dan memutuskan mengenai, antara lain, pemecatan pegawai tersebut. Dalam kes ini, perayu mengakui melakukan kesalahan yang dipertuduhkan dan merayu supaya hukuman diringankan. Dalam keadaan ini, prosiding disiplin tersebut adalah menurut Perintah-Perintah Am dan tiada ketidakadilan atau kesalahan berlaku terhadap perayu dalam prosiding disiplin tersebut (lihat perenggan 13, 14, 19 & 20); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l Perumal* [2001] 2 MLJ 417 diikuti.
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- E** (2) Kelewatan yang dinyatakan oleh perayu dalam kes ini hanyalah lebih kurang selama satu tahun. Memandangkan perayu mengakui akan kesalahan yang dipertuduh dan tiada dakwaan niat jahat di pihak responden-responden, hakim Mahkamah Tinggi tidak salah dalam memutuskan bahawa kelewatan tersebut tidak membatalkan pemecatan tersebut (lihat perenggan 15 & 16).
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- (3) Kesalahan kedua iaitu mengakibatkan kecederaan dengan sengaja kepada seorang pegawai kanan yang diakui oleh perayu merupakan suatu kesalahan berat. Tiada keterangan yang boleh ditafsirkan sebagai membiarkan kesalahan tersebut. Fakta bahawa perayu ditukarkan ke tempat kerja yang lain selepas kejadian tumbuk-menumbuk bukanlah keterangan bahawa perkara tersebut dibiarkan. Keputusan pihak berkuasa disiplin dibuat setelah penelitian rapi terhadap surat tunjuk sebab dan juga representasi perayu dan kelewatan memulakan tindakan disiplin terhadap perayu tidak boleh bermaksud membiarkan kesalahan yang didakwa tersebut (lihat perenggan 17 & 18).]
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Notes

- I** For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 920–953.

Cases referred to

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (folld)

M Sentivelu a/l R Marimuthu v Public Service Commission Malaysia & Anor [2005] 5 MLJ 393, CA (refd) A

Patto a/l Perumal v Menteri Hal Ehwal Dalam Negeri [1989] 1 MLJ 255, HC (not folld)

Public Service Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (menggantikan *M Senthivelu a/l R Marimuthu, si mati*) Civil Appeal No 01-8-2007 (W), unreported (refd) B

Legislation referred to

Penal Code

Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 general order 26, 26(3), (4) C

Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.

Nik Mohd Nor Nik Kar (Senior Federal Counsel, Attorney General's Chambers) for the respondent. D

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is the judgment of the court. It is a unanimous decision. E

THE FACTS

[2] In 1974 the appellant commenced employment with the Government of Malaysia, the second respondent as a general labourer. Later, in 1976, he held the post of a security guard, viz, a timescale security officer in the administration and finance division of the Prime Minister's Department. F

[3] By letter dated 26 June 1992 he was asked to show cause, pursuant to General order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('the General Orders'), why he ought not be dismissed from service or demoted upon the following charges, namely: G

- (a) that on 9 May 1991 he was absent from his place of duty without permission between 7.10am and 7.30am ('the first charge'); and H
- (b) that on 15 May 1991 at 6.55pm he punched Mat Simin bin Jaafar, a senior security officer ('the second charge').

[4] The appellant responded to the show cause letter by letter dated 15 July 1992 wherein he admitted that he committed the disciplinary offences and explained the circumstances of its commission. He then prayed for forgiveness and undertook not to repeat the offences. I

A [5] On 21 August 1992 the disciplinary board found him guilty of the two charges and imposed the punishment of dismissal. He was informed by letter dated 5 September 1992. His appeal to the disciplinary appeal board was dismissed. He was informed by letter dated 1 April 1993.

B [6] On these facts, the appellant sought a declaration in the High Court against the Public Service Commission ('the first respondent') and the Government of Malaysia ('the second respondent') that his dismissal was unlawful, void and of no effect, that he was still a civil servant and that an enquiry be held to determine the salaries, emoluments and other benefits due to him. In the court below, he proceeded on only two grounds, namely:

- C (i) that the failure by the first respondent to give any reasons for the dismissal is against the rules of natural justice;
- D (ii) that there was a long and unexplained delay by the first respondent in initiating the disciplinary proceedings.

E [7] In their defence the respondents disputed the appellant's claim that the dismissal was null and void, inoperative and of no consequence on the grounds canvassed by the appellant and contended that the dismissal was made in accordance with the General Orders and that there is no basis for the appellant to bring this suit.

F JUDGMENT OF THE HIGH COURT

G [8] The learned judge of the High Court dismissed the action and hence, this appeal. The trial in the High Court proceeded only by way of submission on documentary evidence, the appellant's counsel having opted not to call any witnesses. After the completion of his submission, counsel for the appellant made an oral application to amend the statement of claim to include another ground for nullifying the dismissal, namely, that the appellant was not given an opportunity to make a plea in mitigation before he was dismissed. The learned judge dealt with this application as follows:

H The application was prompted by the decision of the High Court in the *Utra Badi* case. The plaintiff's counsel submitted that although the plaintiff had made a plea in mitigation in his letter of representation, proper process required that he be given an opportunity to make a plea in mitigation after he was found guilty. The decision on the application to amend was postponed to await the ultimate appellate decision in the *Utra Badi* case. It has been ultimately decided by the Federal Court in *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 551 e-f, that 'there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced

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in rank'. With that decision, the proposed amendment to the statement of claim would be an exercise in futility and I dismiss the application.

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[9] In his grounds of judgment with regards to the first ground, viz, failure by the first respondent to give any reasons for the dismissal, the learned judge said:

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I do not think that the failure in this case to give reasons for finding that the plaintiff had committed the alleged offences should have the consequence of nullifying his dismissal. The plaintiff had admitted that he did commit the offences. The failure to give reasons for finding him guilty could not have prejudiced him in his appeal to the appeal board, which could only have been an appeal as regards sentence and not as regards the finding of guilt. I say 'could only have been' because the contents of the appeal is not in evidence.

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[10] With regards to the second ground, viz, on the issue of delay in initiating the disciplinary proceedings, the learned judge said:

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There was a lapse of about a year after the commission of the offences before disciplinary proceedings were commenced. The plaintiff relies by analogy on para (5) of the Headnote to *Patto a/I Perumal v Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 1 MLJ 255, which says:

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(5) In order for the detention order to be valid, there ought to be proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at by the minister. An unexplained and long delay will be fatal to the plea of subjective satisfaction. In this case, there was a time lag of more than two years from the date of the last incident mentioned in the statement of allegations of fact up to the date of making of the detention order. Unless there was a satisfactory explanation for the delay, the subjective of the minister must be held to be not genuine or to be colourable.

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That was an application for a writ of habeas corpus in a preventive detention case. I do not think that the analogy of unexplained delay rendering a detention order invalid in such a case can appropriately be applied to cases of dismissal from employment so as to produce the conclusion that mere unexplained delay nullifies a dismissal. There is no suggestion here of the existence of some element behind the unexplained delay, such as bad faith, that might nullify the dismissal.

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THE APPEAL

[11] The appellant raised three grounds in his memorandum of appeal, namely:

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- (a) that the learned judge ought to have concluded, having regard to the facts and circumstances prevailing, that the appellant had a right to be heard in mitigation before he was dismissed and that he misdirected

- A himself when he concluded that the proposed amendment to the statement of claim would be an exercise in futility and dismiss the application;
- B (b) that the learned judge ought to have concluded that the delay of one year in the commencement of disciplinary proceedings against the appellant after the commission of the alleged offence was fatal as no explanation was forthcoming from the respondent; and
- C (c) that the learned judge ought to have concluded that the delay adverted to in para 2 herein amounted to condonation of the alleged offences by the appellant, thereby precluding the respondent from instituting disciplinary proceedings against him.

JUDGMENT OF THE COURT

- D [12] We had on 6 October 2008 dismissed the appeal with costs and affirmed all orders of the High Court. We further ordered the deposit be remitted to the respondents to account of taxed costs. Our reasons for dismissing the appeal follows.

E RIGHT TO MITIGATION BEFORE DISMISSAL

- F [13] In his submission before us, learned senior federal counsel for the respondents pointed out that this point was only raised after the conclusion of the trial vide an application by the appellant's counsel to amend the pleadings. The learned judge deferred his decision on the appellant's application to await the ultimate appellate decision in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi all Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525. In that case, the
- G Federal Court held that there is certainly no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced in rank and that, in fact, under General Order 26(4) of the general orders, the disciplinary board was not even required to make a finding of guilt. In *Utra Badi*, one of the questions posed before the Federal
- H Court was as follows:

- I Whether a show cause letter issued by a Public Service Disciplinary Authority which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with the provisions of art 135(2) of the Federal Constitution that no member of a public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard?

In delivering the judgment of the court, Abdul Malek Ahmad FCJ said (at p 440 (MLJ); p 551 CLJ))

Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with art 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading senior federal counsel in his submissions and as propounded in the long line of authorities considered, there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para (4) of general order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicate that there is only one hearing for a show cause letter issued under that general order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately.

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[14] In light of the decision in *Utra Badi*, we cannot fathom where the learned judge went wrong when he concluded that the proposed amendment to the statement of claim would be an exercise in futility and dismissed the application. The contention that the learned judge misdirected himself cannot stand at all.

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DELAY

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[15] The second ground raised by the appellant is with regards to the delay of one year in the commencement of disciplinary proceedings against him which he contend is fatal. He relied on *Patto all Perumal v Menteri Hal Ehwal Dalam Negeri* [1989] 1 MLJ 255 to support his appeal. The learned judge decided that the decision in *Patto*, which relates to an unexplained delay rendering a detention order invalid cannot appropriately be applied to cases of dismissal from employment so as to produce the conclusion that mere unexplained delay nullifies a dismissal. We agree with the learned judge.

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[16] On the issue of delay, the appellant's counsel referred to *M Sentivelu all R Marimuthu v Public Service Commission Malaysia & Anor* [2005] 5 MLJ 393. In *Sentivelu*, disciplinary proceedings against the appellant, a clerk in the postal department commenced in October 1984 in respect of offences committed by him between January and May 1977. The only point raised by the appellant at the appeal was that he was deprived of procedural fairness because of a seven year delay on the part of the respondent in bringing the charges against the appellant. This court held that the seven year delay had caused the appellant substantial prejudice especially in the absence of an oral hearing but this court was also of the view that it all depends on the fact of each case. In the instant appeal, the delay was only for about one year. The appellant admitted committing the offences which he was charged with. Further, there was no allegation of bad faith on the part of the respondents that might nullify the dismissal. Under such circumstances, we cannot see

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- A where the learned judge erred in his finding on this issue.

CONDONATION

- B [17] This issue seems to be related to the second issue discussed above, namely, the appellant is saying that the delay in commencing the action against him amounted to condonation of the alleged offences. Learned senior federal counsel for the respondents pointed out that this issue was never raised in the court below but that if the court is minded to deal with the issue, he submitted that this issue is without merit. He then pointed out that the
- C decision of this court in *Sentivelu* has been set aside by the Federal Court on 23 September 2008 (see *Public Service Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (menggantikan M Senthivelu a/l R Marimuthu (si mati)* (Civil Appeal No 01–8–2007(W) (unreported)) and that in
- D delivering the judgment of the Federal Court, Zaki Azmi CJ opined that the delay per se is not a ground for holding that the disciplinary action should be held null and void and the decision be set aside. He also held that the delay did not amount to condonation.
- E [18] We would agree with the learned senior federal counsel that this issue of condonation is without merit. According to the *Concise Oxford Dictionary* (9th Ed), the word ‘condone’ means ‘to forgive or overlook (an offence or wrongdoing); approve or sanction, usu reluctantly’. The appellant’s counsel argued that the appellant was transferred to another workplace after the
- F incident. We fail to see how this move can be interpreted as amounting to condonation. There is no evidence that all was forgiven. Under the circumstances of this case, there cannot be condonation in any form whatsoever. As we have stated earlier, the appellant admitted committing the disciplinary offences and the decision of the disciplinary action was given
- G after careful consideration of the show cause letter and his representation. Further, the second offence was a serious offence. Punching a person is tantamount to voluntarily causing hurt, an offence under the Penal Code. The appellant admitted that he punched his senior officer.

H CONCLUSION

[19] General order 26(3) of the General Orders provides

- I If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

General order 26(4) of the same provides:

If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

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General order 26(4) of the General Orders clearly provides that if the officer furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on, inter alia, the dismissal of the officer. In his representation to the disciplinary authority, the appellant admitted having committed the offences that he was charged with. He then prayed for leniency and promised not repeat such offences in the future. Under these circumstances, we find no injustice has been occasioned. Punching a senior officer is indeed a serious offence.

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[20] We find that the disciplinary proceedings conducted against the appellant were in compliance with the General Orders and that the learned judge was correct in holding that there were no improprieties in the disciplinary proceedings conducted against the appellant. As such, we see no reason why we should disturb the findings of the learned judge. For the aforesaid reasons we dismissed the appeal with costs and ordered the deposit to be remitted to the respondents to account of taxed costs.

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Appeal dismissed with costs.

Reported by K Nesan

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